No. 183.

Petition for Rehearing.

Supreme Court of the United States.

Rec'd & Dec'd April 26, 1900.

OCTOBER TERM, A. D. 1898.

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JOHN W. ARNOLD,
Plaintiff in Error

vs.

LEWIS HATCH,
Defendant in Error.

In Error to the United States Circuit Court of Appeals for the Seventh Circuit.

Petition for Rehearing.

KENESAW M. LANDIS,
Of Counsel for Plaintiff in Error.

Monitor Printing Company, 1533 West Lake Street, Chicago.

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And now comes the plaintiff in error, John W. Arnold, by Kenesaw M. Landis, his counsel, and petitions and moves for a re-hearing in this cause and of the rulings and judgment order of this Honorable court entered herein on April 9, 1900, at the present term of this Honorable court, in and by which judgment order this court affirmed the judgment of the United States Circuit Court of Appeals for the Seventh Circuit; and that said order be set aside and the cause re-heard.

And as ground for this request, plaintiff in error suggests:

First. That even under this court's interpertation of the contract between the defendant in error, and his son (the execution debtor), only so much of the property levied upon, and the title to which is in dispute here, is to be released from the levy, as equals, in amount and kind, the personal property on the farm at the time the contract was made; and

Second. That under the same interpretation the 150 tons of hay and four stacks of oats (*the product of the son's operation of the farm*), included in the levy cannot be released therefrom; for, under the same interpetration of the contract, and according to its literal terms, the son "should have the product of the farm."

In support of his petition the plaintiff in error ,begs to respectfully submit the following:

In the trial court the burden was on the defendant in error, to show affirmatively to what extent the marshal levied on property *like in kind* to that which was on the farm at the time the contract was entered into. And in-so-far as the record fails to disclose that the son received from the father property of the kind levied upon, it necessarily follows that to that extent the levy must be sustained. Manifestly, it would not be right to adjudge, as in the father, the title to any of the property *different in kind* from or exceeding in amount, that delivered by him to the son, for (quoting again from the opinion of the court), "the son's "only obligation was to return the property on demand, *or substituted property of the same kind and amount.*"

The defendant in error testified (Rec., p. 45), that when the levy was made, "*there was more sheep on the farm*" than there was when the contract was executed; further, that "when the levy was made *there was more cows*;" and the execution debtor (defendant in error's witness) testified (Rec., p. 66), that two of the plows and one corn-planter (Rec., p. 67), levied upon were not on the farm when he took charge. There was also taken in the levy (Rec., p. 9) eleven hogs, *and the defendant in error, made no showing whatever that there were any hogs on the farm when the contract was made.* These things being so, it is respectfully submitted as an inevitable conclusion that to that extent at least the judgment of the court of appeals was wrong.

As to the four stacks of oats and one hundred and fifty tons of hay produced by the son on the farm, the levy must stand.

The undersigned confesses to some embarrassment in discussing this branch of the subject, for the reason that under the court's interpretation of the contract (quoting from the court's opinion) "the son should have the *product of the farm*," and therefore that the hay and oats—*the product of the farm*—belonged to the son seems to necessarily follow as a matter of course. Still this court has decided otherwise. (That the hay and oats were produced on this farm see testimony of defendant in error's witness Frank W. Hatch, Rec., pp. 53 and 54.) To clothe the defendant in error with title to this last mentioned *product of the farm* would not be to *interpret* the contract of the parties, but rather would *nullify* it, would defeat its manifest and deliberate purpose.

If there could possibly be any doubt of this, it is utterly dispelled by your Honor's view of the "wool transaction." Quoting again from the opinion of the court, "There was "evidence that in the Spring of 1897, (the levy was made in "August of the same year) *the son sold to his father* for "$1,000 a quantity of wool *produced on the farm;* but as "it was also a part of the agreement that the son *should* "*have the product of the farm*, there was nothing inconsistent with it in the sale of the wool." Of course, the father did not purchase the wool that *already belonged to him*, and yet the logic of the court's opinion is that he did just exactly this thing. If in the Spring of 1897, *the father had not paid the son $1,000 for this wool*, and it had remained in the barn and been levied upon, it also (in the court's view of the case) would have belonged to the father along with the hay and oats—the other product of the farm—and (according to the court's opinion) *the wool and hay and oats would have been liable to seizure on execution for the father's debts.*

It is respectfully, but most earnestly submitted, that such seizure could not possibly have been justified. And if that is so does it not follow that, at least as far as the hay and oats are concerned the judgment of the Court of Appeals cannot stand?

There is a rule of this court which allows a defeated litigant to petition for a rehearing of his case. If, in the judgment of counsel the court has reached an erroneous conclusion, certainly counsel should not omit any effort which in his opinion, may tend to enable the court to get right. In this view, the undersigned conceives it to be his duty to invite the court's consideration of the following suggestions with respect to the legal status of the entire mass of property taken under this execution.

Quoting the language of the court, in the opinion delivered on the 9th day of April, 1900, the contract between the defendant in error and his son, Frank W. Hatch, the execution debtor, provided "that the latter should under-"take the management of the farm, farm implements and "live stock, make all repairs, pay all taxes and other ex-"penses, replace all implements as they were worn out, "keep up all live stock, and have as his own the net profits. "It was further stipulated that each party should be at liberty "to terminate the arrangement at any time, and that the son "should turn back to his father the farm with its implements, "stock and other personality, of the same kind and amount "as was on the farm when the father retired;" and "there "was evidence showing, not only that the son assumed the "entire management of the farm, but that he was at full "liberty to sell and dispose of its products, to replace old "stock and implements with new, and to appropriate the "net proceeds to himself; and that his only obligation was

"to return the property, or *substituted property* of the *same* kind and *amount*."

Under the terms of this contract the undersigned submits that during the life of this agreement the relations of the Messrs. Hatch to the personal property on the farm were as follows:

1. The father retired from the farming business and the son went into the farming business.

2. The father had no responsibility, pecuniary or otherwise, with respect to the personal property, either as to its management or disposition, directly or indirectly. Legally, it made no difference to him whether crops were good or bad, whether disease invaded the flocks or not. His son was under contract, *binding and legal*, to return to the father, on demand, *the same amount and kind* of property as was on the farm at the beginning.

3. Under this contract all liabilities and benefits were with the son. If crops were poor, the loss was his, because the profits were his, and poor crops meant low profits, or none at all. And more than this, if disease carried off the sheep, or cattle, or hogs, the loss was his, absolutely, under the above contract as quoted by the court in its opinion, for did not the father have the son's binding, legal obligation to demand and receive from the son article for article to the full extent that such property was on the farm when the father retired?

4. While the father was obliged under the contract to receive the identical property from the son, if he tendered it in discharge of his obligation, the latter was not obliged to deliver to the father the identical property. The son had the option to deliver the *same kind and amount* of property.

Therefore the son, *at any time*, could fullfil his promise by tendering to his father on the farm *any property* like in kind and amount, even though the son brought it onto the farm from somewhere else.

The plaintiff in error is entitled to have the contract interpreted and enforced as the parties themselves deliberately made it, and not according to their supposed but unexpressed understanding of its terms, and the words employed, not being of technical meaning, are to be taken in their common, ordinary acceptation. Quoting again the language of the court in its opinion, the son's only obligation "was to return the property on demand, or substituted "property of the same kind and amount."

Now, suppose that during the life of the contract an execution had issued against the property of William Hemingway, and that the marshal had levied that execution on the property (the title to which is in dispute in this suit), is it not clear that it would have been the *son's* business to file an intervening petition to have the property released from the levy? And if the levy of the execution against Hemingway had been sustained by the courts, would not the loss of the property have fallen on the son—would not the father have a clear right to demand and receive from the son *property like in kind and amount to that which was on the farm when the father retired?* The father could not have filed such an intervening petition for the manifest reason that he had no title to that particular property. He could not sell it. He could not give it away *so long as the contract with his son should last.* All he had was his son's promise to deliver to him at some future, undetermined time so much property of a certain kind, and it could make no difference to him whether the

court released or sustained the levy under the Hemingway execution. He still had the son's obligation to deliver sheep for sheep, steer for steer and plow for plow, no matter what decision the court might render. If these things be true, it is submitted that *legally* this contract reposed the title to the property in Frank W. Hatch.

The contract was a sale of the property. Under its terms the consideration moving from the father was his delivery of the property to the son, and the consideration moving from the son was his promise to deliver to the father at some future time, on demand, a like amount of the same kind of property.

In the opinion referred to the court say:

"It is very evident no sale of the farm property was *intended.* * * * Indeed, *the only indicium of a sale* is "the provision that the identical property received need not "be returned, *but that other property of the same kind "might be substituted.*" This statement of the court is in entire harmony with the understanding of the plaintiff in error. This was the exact situation in all of the cases quoted in plaintiff in error's original brief, and which follow here:

Story on Bailments, Sec. 439.
Lonergan vs. Stewart, 55 Ill., 49.
Newmarks Law of Sales, pp. 17, 18.
Schouler's Bailments and Carriers, 2, Ed. Sec. 6.
Benjamin on Sales, 6 Ed. Bennett's, p. 5.
Good vs. Winslow, 4 Allen, N. B., 241.
Butz vs. Diehl, 117 Pa., St., 589, 603.
2 Kent. Com., 509.
Buffum vs. Merry, 3 Mass., 478.
Hurd vs. West, 7 Cowen, 752.
Johnston vs. Brown, 37 Iowa, 200.
Chase vs. Washburn, 1 Ohio St., 244.
Woodward vs. Seemans, 125 Ind., 330.
Smith vs. Clark, 21 Ibend., 84.

Wilson vs. Cooper, 10 Iowa, 565.
Ewing vs. French, 1 Black (Ind.), 354.
Jones on Bailments, 105-106.
Butterfield vs. Lathrop, 71 Pa., 225.
Carpenter vs. Griffin, 314.

Of this "indicium of a sale" Mr. STORY has said; "The "distinction between an obligation to restore the *specific* "thing received or to return *others* of equal value, *is the* "*distinction between a bailment and a sale.*"

In all of these cases, "*the only indicium of a sale* was the provision that the identical property need not be returned, but that other property of the same kind might be substituted." This was the one distinguishing characteristic of all of them. In not one of them did the parties *intend* to make a *sale* of the property, or *understand* that they had made a *sale*. *In all of them, the courts* adjudged the transaction to be a sale, *for the one and only reason that other property, like in kind and amount*, might be delivered. In each instance the court reached this conclusion by giving the natural, ordinary meaning to the words deliberately employed by the parties themselves, regardless of the *possibility* that they may have imperfectly or incorrectly *expressed* their real intention, or that they had failed to appreciate the true legal meaning of the terms adopted.

The court in its opinion (referring to authorities quoted in original brief of plaintiff in error) proceeds:

"But these authorities have no application to the case "under consideration. Here there was no provision for a "substituted property beyond that required by the nature "of the property delivered. The arrangement was to be "indefinite in its continuance. The property was mostly "animals, which would necessarily die, be sold or slaugh-"tered in a few years, and the gradual substitution of their "progeny, or other similar cattle, and a renewal of worn-"out implements was all that was contemplated. The sti-"pulation that this might be done was a mere incident to "the main agreement, by which the property was to be re-"turned in like good order as received."

The undersigned has no desire to tax the patience of the court, but (in view of an apparent misapprehension) he conceives it to be his duty to call your Honors' attention, specifically, to at least one of the cases thus referred to by the court, and liberally quoted from at page 27 of his original brief. It is the case of *Carpenter vs. Griffin*, 9 Paige, 314, and from the opinion the following language of the court is quoted.

"In the present case the stipulation * * * is to re-"turn at the end of 5 years cows of equal age and quality, "which necessarily excludes the idea that the identical cows "put on by the landlord were to be returned to him at the "expiration of the term. For those cows could not be of "equal age, although they might possibly be of equal value. "In relation to goods thus let with the farm, *they are the goods "of the tenant and may be attached and sold for the payment "of his debts.* * * * *By applying the well established "principles of law, I am bound to decide the legal title to the*

"cows and sheep brought onto the farm at the commencement "of the term passed to the tenant, so as to give him the right "to dispose of them and subject them to seizure and sale for "his debts."

It is submitted that it would be difficult to find an authority more applicable to a pending case. Indeed it would seem to be almost an identical case. The only *"indicium of sale"* was the provision that "cows of equal age and quality were to be returned," and the court held that it was a sale, *for that reason alone.* In that case (as in the case at bar) "there was no provision for a substituted property be- "yond that required by the nature of the property deliv- "ered," and there "the property was (*entirely*) animals, that "would *necessarily* die, be sold or slaughtered in a few "years."

In concluding the opinion, the court say (speaking of the agreement between the Messrs. Hatch, as first above quoted):

"Similar agreements have been sustained as against "creditors in a number of cases," citing *Chatard vs. O'Donovan*, 80 Ind., 20; *Wilbur vs. Sisson*, 53 Barb., 259; *Bowman vs. Bradley*, 151 Penn. St., 351; *Kerrains vs. People*, 60 N. Y., 221; *Haywood vs. Millor*, 3 Hill, 90; *Brown vs. Scott*, 7 Vt., 60; *Peters vs. Smith*, 42, Ill., 422; *State vs. Curtis*, 20 N. C., 226.

This seems to render proper at least a brief consideration of each of these cases so regarded by the court as an authority here.

In *Chatard vs. O'Donovan*, 80 Ind., 20, the defendant in error was a Catholic priest at Brownsburg, Indiana, and by virtue of his position occupied the parsonage, which belonged to the Roman Catholic church, and the legal title to which was in Chatard, the bishop of the diocese. For some reason, O'Donovan was relieved of his priestly duties by the bishop, who demanded that the ex-priest surrender the parsonage for the occupancy of his successor. O'Donovan refused to get out, and in ejectment the court held that he had no right to stay.

The plaintiff in error believes this decision to be good law, but is forced to confess his inability to see that it has any application here.

In *Wilbur vs. Sisson*, 53 Barb., 259 (quoting the language of counsel for defendant in error, at page 19 of his original brief) "One John Gamel, agreed to work the dairy "and land of Conger for one year. For the use of the farm "and dairy, he was to deliver to Conger 9,600 pounds of "cheese at the factory managed by Sisson. The milk from "the dairy was taken to the factory, and made into cheese. "The cheese was converted into money, which remained in "the hands of Sisson. This cheese, the defendant Sisson "claimed, was, by force of the agreement, the property of "Conger, and that he should be permitted to pay the money "to Conger. * * * The compensation of the owner "(Conger) was to be * * * 9,600 pounds of cheese.

The plaintiff in error has no fault to find with this decision. The court undoubtedly correctly applied the law. But it is deemed proper to suggest that it is not an authority for anything in controversy here. If the contract had provided that the 9,600 pounds of cheese were to go to Gamel, *who worked the farm* (instead of to Conger, who owned the farm), and the sheriff had seized the cheese under an execution for Gamel's debts, we would then have the present case. From the reasoning of the court, nothing can be more plain than that, had the case come up in that posture, the execution levy would have been sustained.

In *Bowman vs. Bradley*, 151 Penn. St., 351, (another one of the cases which the court cites as sustaining against creditors an agreement similar to the Hatch agreement) Bradley owned a farm of twenty-nine acres, of which four or five acres were occupied by a mill and pond operated by Bradley, the owner; Bradley hired Bowman and his family for $1 a day, to care for the farm and stock; in addition to the $1 a day, Bowman was to have the use of a house on the premises for himself and family. The parties got into a dispute, and Bradley discharged Bowman, and ordered him to vacate the house, claiming that the contract was terminable at his pleasure; Bowman refused to move, claiming that he had a contract for a year. The court held "the "terms of the contract was for the jury to determine, but "the terms being fixed, their legal import was for the court." And the court proceeded: "The house was a convenient "place for the residence of the *laborer*. * * * His pos- "session was that of the owner whom he represented and "for whom he labored for hire." Interpreting the contract according to Bradley's version, of course, no plausible theory could be advanced in support of Bowman's contention.

It is not observed in just what respect this authority sustains "a similar agreement" to the Hatch contract "as against creditors." There was no question of the kind remotely involved in the case. Bowman was a mere hired laborer at $1 a day. No question of the ownership of any property, real or personal, appears to have been raised. The court simply decided that a farmer has a right to get rid of his hired man employed for an indefinite period, when the farmer conceives it to be to his interest to sever the relation.

The case of *Kerrains vs. The People*, 60 N. Y., 221, is also cited by the court as sustaining "as against creditors," an agreement similar to the Hatch contract. In this case, Kerrains, for several years, had worked for a man named Son, and lived in a house belonging to Son. In 1871 the parties made a new agreement, by which Kerrians was to work for Son, at whatever he was told to do, for one year, "if they could agree," Son paying Kerrians 13 shillings per day and furnishing him a house. Kerrains refused to do some work demanded by Son, whereupon the latter paid Kerrains his wages, discharged him, and told him to vacate the premises, which he refused to do. Thereupon, Son proceeded to remove Kerrains' furniture from the house, and the latter assaulted Son.

The court held that the employer had a right to remove the furniture from the house.

It will be observed that this case, like the preceding ones, was also free from any question relating to the ownership of property, or to the rights of creditors in the same, or to any proposition which the court, in the text of its opinion, considered involved in the case at bar.

In *Haywood vs. Miller*, 3 Hill, 90, (also cited by the court with the preceding cases,) the plaintiff, a farmer, owned two farms, several miles apart. He made a contract with Miller, by which the defendant agreed to work for the plaintiff for one year, at a compensation of $160. Miller moved his family into the house on one of the farms, and Haywood directed him to perform some labor, which he refused. Thereupon, Haywood forcibly put Miller and his furniture out of the house, and Miller sued for damages.

There was no question of the ownership of property, real or personal, raised or decided in this case.

The case of *Brown vs. Scott*, 7 Vt., 60, (also cited by the court), *was* a case involving the title to property. Brown, the plaintiff, had purchased a farm, to furnish a home for an indigent father, and suffered him to go there and labor and live. He produced some hay, which his creditor levied upon and sold. The son, who owned the farm, sued the sheriff for the value of the hay, and the Supreme Court of Vermont held that the hay did not belong to the father.

But, suppose in that case the court had been confronted with such a contract as we have here, providing *expressly* "*that the hay*—the product of the farm," *should belong to the individual running the farm*, is it not manifest that the levy would have had to be sustained?

Still considering the cases cited by the court "as sus- "taining similar agreements as against creditors," we come to *State vs. Curtis*, 20 N. C., 226, which counsel for defendant in error, in his brief (page 36) aunounces "grew "out of facts in many respects similar to the case on hear- "ing."

In this case, Pope, an *overseer*, was employed by Curtis, a planter, who gave him in the house a room in which to lodge. The plaintiff, being dissatisfied with his overseer, sought to get him out of the house, with the result that there was trouble, resulting in the prosecution of the planter. And this is what the Supreme Court of North Carolina says:

"Certainly, it has never been understood among us that "when a planter places an overseer on his plantation to "superintend *his* operations and hands there, that he puts "him into possession as against himself, so that he cannot "turn him off during the year. * * * The redress of "the overseer is by action on the contract of the employer, "and not by holding over that which was never in his "possession for an instant, but as the servant and agent of "his employer."

In this case your Honors, will observe there was no controversy about the ownership of property under levy of an execution. The relation between the planter and the *overseer employed by him* "to superintend *his* "hands" *did not in any one respect* resemble the relation existing between the senior Hatch and his son, whom (quoting from the opinion of the court) *the father had put "upon the footing of an independent farmer*." The plaintiff in error is unable to see that the case of the overseer can be considered as authority here.

And lastly, we have the case of *Peters vs. Smith*, 42 Ill., 422. This was replevin for live stock and implements. The plaintiff had purchased the property and placed it in the hands of his brother, to be used by him in the farming business until plaintiff required *them* to be returned. A judgment creditor of plaintiff's brother levied on this property, and the case was tried and disposed of *entirely with respect to the statute of frauds*. The rule contended for here by plaintiff in error was not considered. If it had been, we can only conclude it would have been recognized and adopted by the Supreme Court of Illinois, as it was three years later in *Lonegarn vs. Stewart*, 55 Ill., 44.

It is believed that this is such a case as the court had in mind when the rule providing for a re-hearing was made; that, from the foregoing, it is apparent that a re-examination would result in a reversal of the judgment of the Court of Appeals; that, even if this court, on such re-examination, refused to modify its view as to the effect of the contract on the great mass of the property levied upon, the court would allow the judgment to stand *only as to such property levied upon as equalled in kind and amount that property which was on the farm when the contract was made*, as shown by the record; and, certainly, that the court would not release from the levy the hay and oats, *produced* by the son on this farm.

Respectfully submitted,

KENESAW M. LANDIS,
For Plaintiff in Error.

I certify that, in my opinion, the foregoing petition is well taken, and that said cause should be re-heard.

KENESAW M. LANDIS,
Of Counsel for Plaintiff in Error.